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Apr. 11

Honorable Elwell A. Atherton
President of the Senate
Concord, New Hampshire

Dear Sir:

You have asked if there are any provisions in the New Hampshire Constitution or in our laws which forbid Senator Brown from participating in a vote on the passage of House Bill No. 17. This bill forgives the judgment for \$257,528.55 which the State holds against its former treasurer, R. Gordon Fittell.

It is a well known fact that the firm of Malone, Davis, Carleton and Craf were retained as special counsel for the State in this matter, and that Senator Brown is associated with it and actively participated in the litigation which resulted in the judgment. This fact, as well as the fact that he had, through this association acquired special knowledge in the case, was well known to his constituents at the time Senator Brown was elected to office.

The terms of the retainer agreement require the State to pay fees to Malone, Davis, Carleton and Craf on the basis of work performed for the State in the courts. No contingency fee is involved. No fees have been paid for services in State v. Fittell up to the present time. Such fees as are reasonable and approved by this office and by the Governor and Council will be paid by the State to Malone, Davis, Carleton and Craf for services in the court case regardless of whatever action may be taken by the Legislature on House Bill No. 17. Neither Senator Brown nor the firm with which he is associated will receive any fee for any activity of Senator Brown in the Legislature on this matter.

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CONCORD, N.H.

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Honorable Playlock Atherton -- 2.

Our Constitution provides in Part II,

Art. 7:

"No member of the general court shall take fees, be of counsel, or act as advocate, in any cause before either branch of the legislature; and upon due proof thereof, such member shall forfeit his seat in the legislature."

Since we have found no court decision on this Article, I have compared it with similar articles in the constitutions of the neighboring New England states adopted in 1793 to determine the thinking prevalent in this area at that time. Such comparison makes it manifestly clear that the founders wanted to prevent any legislator from receiving money to act as counsel before the house to which he was elected as a member. This means receipt of fees from private interests. As previously stated, Senator Brown has not received any fee to act as counsel for the State in this matter before the Legislature, nor will he.

House Rule 17 has no application to the Senate. However, it has usually been held for over a century in our national Congress, where a similar rule prevails, that the member himself should determine whether or not his personal interest in a pending matter should cause him to withhold his vote.

It is my conclusion that it cannot be said as a matter of law that the constitution and statutes of New Hampshire prohibit Senator Brown's participation in the consideration of House Bill No. 17; and that the question as to his qualifications and the exercise of his right to vote and to represent his constituency are questions which rest ultimately in his discretion and in the discretion of the house of which he is a member. I have stated the facts as I know them to be at this time but such statement is not intended in any way to interfere or influence the free exercise of this discretion by Senator Brown and his colleagues in the Senate.

Very truly yours,

Gordon M. Tiffany
Attorney General

GMZ/s